IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.8417 of 2005
WITH
SPECIAL CIVIL APPLICATION No.8418 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
And
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SILVASSA PLAST

Versus

UNION OF INDIA

Appearance:
MR DIPEN A DESAI for Petitioner No. 1
MR JITENDRA MALKAN for Respondent No. 1
..... for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 11/05/2005

COMMON JUDGEMENT

(Per : HON'BLE MS.JUSTICE H.N.DEVANI)

1. By way of these petitions, the petitioner M/s Silvassa Plast has challenged the order No.28/2005 dated 21st April 2005 and order No.29/2005 dated 25th April 2005 respectively, passed by the Commissioner of Customs (Appeals) (hereinafter referred to as the appellate authority), directing the appellant/petitioner to deposit the entire amount of anti-dumping duty as pre-condition for hearing the appeal on merits.

2. As the facts of both the petitions are substantially the same, for the sake of convenience, reference is made to the facts of Special Civil Application No.8417 of 2005.

3. The petitioner is engaged in the business of manufacturing Plasticizer items. During the course of its industrial activities, the petitioner had imported 1638.6173 MTs of Sabutol from South Africa and filed Ex-Bond Bill of Entry No.F-13372 dated 14.07.2003. The aforesaid Bill of Entry was assessed and goods were cleared after payment of normal duty under the provisions of Section 15 of the Customs Act, 1962 (the Act).

4. It appears that pursuant to Anti-Dumping investigation relating to certain types of Acyclic alcohols originating from Brazil, Malaysia, Romania, Singapore and South Africa conducted by the designated authority of the Ministry of Commerce, Government of India, preliminary findings were recorded and accordingly Notification No.63/1/2001-DGAD dated 29th July 2002 was issued. On the basis of the preliminary findings, the Central Government, in the exercise of powers conferred by sub-section (2) of Section 9A of the Customs Tariff Act, 1975, read with Rules 13 and 20 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (the Rules) imposed a provisional anti-dumping duty on Acyclic alcohols vide notification No.90/2002-Cus dated 5th September 2002. The subject goods, namely, Sabutol were also covered by the said notification. The anti-dumping duty imposed under the said notification was effective upto and inclusive of the 4th day of March, 2003.

5. Upon completion of the Anti-Dumping investigation, the designated authority issued its final findings vide notification No.63/1/2001-DGAD dated 29th July 2003. On the basis of the aforesaid final findings of the designated authority, the Central Government in the exercise of powers conferred by sub-section (1), read with sub-section (5) of Section 9A of the Customs Tariff Act and Rules 18 and 20 of the Rules imposed final

anti-dumping duty vide notification No.143/03 dated 1st October 2003. Paragraph No.2 of the said notification provides that anti-dumping duty imposed under the said notification shall be levied with effect from the date of imposition of provisional anti-dumping duty, that is, 5th September 2002.

6. Aggrieved by the said final finding and the corresponding notification issued by the Central Government, M/s Indian Plasticizers Association of which the petitioner is a member, has filed an appeal under Section 9C of the Customs Tariff Act, 1975 before the Customs, Excise and Service Tax Appellate Tribunal, which is pending before the Tribunal.

7. By a show cause notice dated 8th December 2003, issued under the provisions of Section 28 of the Act, the respondent No.2, Assistant Commissioner of Customs (Bond), Custom House, Kandla called upon the petitioner to show cause as to why anti-dumping duty should not be recovered on the goods cleared as aforesaid, in view of the notification dated 1st October 2003 and as to why interest payable thereon should not be recovered as applicable. The petitioner contested the show cause notice, however, by an Order-in-Original dated 17th January 2005, the respondent No.2 confirmed the demand of Rs.25,74,040/- and directed that the same be paid with interest.

8. Being aggrieved by the aforesaid Order-in-Original, the petitioner preferred an appeal before the respondent No.3 appellate authority, along with an application under Section 129E of the Act seeking stay of the order in original as well as waiver of pre-deposit. By an order dated 21st April 2005, the appellate authority refused to grant waiver of pre-deposit for hearing appeal and directed that the entire amount of Rs.25,74,040/- be deposited as a pre-condition to hearing appeal. In so far as the facts of Special Civil Application No.8418 of 2005 are concerned, by an order dated 25th April 2005, the appellate authority directed that the entire amount of Anti-Dumping Duty amounting to Rs.63,09,394/- be deposited as a pre-condition to hearing the appeal on merits.

9. The aforesaid orders dated 21st April 2005 and 25th April 2005 are subject matter of challenge in the present petitions.

10. Heard Mr.Dipen Desai, learned Advocate for the

petitioner and Mr.Jitendra Malkan appears on advance copy. This matter was heard at length on 9th May, 2005, whereupon Mr.Malkan had sought for time to take instructions, and accordingly the matter had been adjourned to 11th May 2005. Looking to the nature of the issue involved in the present petitions, both the matters were taken up for final hearing today with the consent of the learned advocates for the parties.

11. RULE. Mr. Malkan, waives service of Rule on behalf of the respondents.

12. Learned Counsel for the petitioner submitted that the anti-dumping duty demand had been made in terms of the notification No.143/2003 dated 1st October, 2003. The petitioner had cleared the goods from the bonded warehouse on 14th July, 2003 and 5th March, 2003 respectively. That on that date, no anti-dumping duty was in force. It was submitted that the provisional duties levied earlier had expired on 4th March, 2003, whereas final anti-dumping duties were levied vide notification dated 1st October, 2003. Hence, though the said notification stated that the duty shall be effective from the date of imposition of provisional duty, in terms of Rule 21(1), final anti-dumping duty cannot be levied for the period prior to the notification of final anti-dumping duty, if no provisional duty had been levied for the said period.

13. Learned Counsel referred to the provisions of Rule 21 of the Rules and submitted that under the said Rule, if anti-dumping duty imposed by the Central Government on the basis of final finding of investigation conducted by the designated authority is higher than the provisional duty already imposed and collected, the differential shall not be collected from the importer. If the duty fixed is lower than the provisional duty imposed the differential shall be refunded and if the duty imposed by the Central Government is withdrawn, the provisional duty imposed and collected shall be refunded to the importer. It was contended that from a reading of the said Rule, it is evident that if the goods are cleared on payment of anti dumping duty as assessed, no further duty shall be recovered. It was submitted that the intent and spirit of levy of anti-dumping duty is that no further anti dumping duty can be recovered subsequent to assessment of duty and clearance of goods.

14. It was also submitted that it is an admitted position that as on 5th March 2003, there was no anti dumping duty in respect of the subject goods, hence, no

anti-dumping duty could be levied in respect of goods that had already been finally cleared. It was urged that the levy of anti dumping duty cannot be made applicable retrospectively to goods which have already been cleared on the strength of assessed Bill of Entry which had been finally cleared permitting the goods to be cleared for home consumption and duty stood paid on the basis of duty so assessed.

15. Apart from the aforesaid submissions on the merits of the matters, the impugned orders were assailed mainly on two grounds. Firstly, that the same do not take into consideration the factum of financial hardship, despite there being specific pleadings to that effect. Secondly, that the learned Advocate, appearing on behalf of the petitioner before the appellate authority, had referred to and placed strong reliance upon the provisions of the Office Memorandum dated 8th September, 2004 and more particularly Paragraph No.3 thereof, however, the appellate authority had omitted to consider the same.

16. Considering the view that this Court is inclined to take, it is not necessary to deal with the various contentions on the merits of the Order-in-Original.

17. In Paragraph No.6 of the Stay application, it has been stated as under:

> "6. The applicant has a strong prima facie case in their favour and the duty demand is totally unwarranted. Further, pre-deposit of the duty demand will cause undue financial hardship to the appellants as the duty demand is quite significant and the current financial position of the appellant is very tight."

However, the appellate authority, in paragraph No.12 of the impugned order observes that the appellant has not pleaded financial hardship, which is evidently contrary to the record of the case.

18. The Office Memorandum dated 8th September, 2004, upon which strong reliance had been placed on behalf of the petitioners, deals with the subject regarding validity of anti-dumping duty notifications. While clarifying doubts raised by the field Commissioners regarding imposition of anti-dumping duties, the department of Revenue, Government of India had conveyed its views on the said subject. Clause No.3 of the said

Office Memorandum reads as under:

> "3. No duty will be collected for the interregnum period if there is a gap between the expiry of provisional duty and notification of the definitive duty."

It is apparent that in the facts of the present case, the aforesaid provisions of the Office Memorandum are of great significance. In Paragraph No.4 of the impugned order, the appellate authority observes as under:

> "4. Personal hearing was fixed for Stay application on 23/3/2005, Shri T. Vishwanathan, Advocate appeared. He referred to the Office Memorandum dated 08/09/2004 issued from F.No.10/10/2003-TRD by the Ministry of Commerce addressed to Shri A.K. Prasad, Director (Customs), M.O.F. He also referred to the opinion given by the then A.S.G. Shri Mukul Rohatgi in the matter."

As can be seen from the impugned order, except recording the fact that the learned advocate had referred to the aforesaid Office Memorandum, the order is absolutely silent in that regard. The appellate authority has disregarded the said office memorandum, despite strong reliance having been placed on the same.

19. Considering the fact that the appellate authority has totally omitted to consider the provisions of the Office Memorandum dated 8th September, 2004 as well as the fact that the appellate authority has observed that no financial hardship has been pleaded, despite there being specific pleading to that effect, it is difficult to state as to how far the order of the appellate authority is vitiated due to relevant factors being ignored amounting to non application of mind. Both the Office Memorandum and the plea of financial hardship are relevant : the former for decision making as to existence of prima facie case and balance of convenience; the latter for decision making as to hardship being caused on being directed to deposit the entire anti-dumping duty. Hence, the impugned orders cannot be sustained.

20. Accordingly, the impugned orders No.28/2005 dated 21st April, 2005 and No.29/2005 dated 25th April, 2005 are hereby quashed and set aside. The respective stay

applications are restored to the file of the appellate authority for taking a fresh decision thereon, after taking into consideration all the contentions raised on behalf of the petitioner. The petitioner shall remain present before the appellate authority on 25th May, 2005 and on the said day the appellate authority will fix the date for hearing of the stay applications.

21. In the result, the petitions are allowed. Rule is made absolute accordingly with no order as to costs.

Registry to place a copy of this judgement in connected matter.

(D.A.Mehta, J)

(H.N.Devani, J)

m.m.bhatt